Law firms need to adjust to new economic realities, and start thinking about lowering fees for their clients, not simply cutting their own costs. “We are suffering the consequences of our own greed,” said Todd Crider of Simpson Thacher & Bartlett in a packed session (‘What’s next for law firms I – profitable pricing of legal services in 2010’).

Speakers agreed that the billable hour is not dead and that it will continue to dominate during their careers. But attitudes differed on everything from alternative fee arrangements (AFA) to invoicing. Antoine Frahan, of FrahanBlondé in Brussels, took a direct approach to pricing: “The problem is usually not about AFAs versus hourly billing. Clients don’t care. They care about it being cheaper,” he said.

According to Frahan, hourly rates themselves are not the only things that need changing. The volume of the work and the way it is delivered is crucial. “If an in-house asks a very specific, targeted question to a partner who is hugely knowledgeable in that field, she will expect a brief answer back,” he said. “If they then receive a bill with 12 hours worth of associate time they’ll wonder where the hell the answer came from. And there might simply be a problem with the output. It might be useless.”

Long memorandums with no direction were cited as a particular concern. “They need one-page memos, which are actionable. Clients actually want to be told what to do.”

Content is also important. In China, he said, the average manager’s monthly salary is $1000 – the same as one hour’s billing from a Wall Street firm. “How do you justify charging a Chinese client that amount?” he said.

Conversely, firms should sometimes raise their rates to avoid embarrassing strategic partners. “You might bill $200 in your country, but if you are working with a UK partner firm and the client starts comparing your fees, they will never swallow the UK rates again,” said Frahan.

Elsewhere in the session, Todd Crider explained to delegates how his firm Simpson Thacher & Bartlett, one of the most profitable law firms in the world, deals with pricing and billing.

“We look at hourly rates subject to discounts on highly leveraged work. So on an antitrust investigation with one partner and 20 associates, we would heavily discount the associates’ rate,” he said.

He also said the firm would often offer a 30% discount on failed deals and ask for 30% premium subject to the success of those deals.

In addition the firm has internal processes whereby any fee arrangement that deviates from the hourly rate must be approved by the management committee. “In some eat-what-you-kill firms, a client will receive bills with different quotes, and different amounts from partners in the same firm,” he said.

Crider was particularly revealing on the subject of invoicing. “I try my best to send a one page, one paragraph invoice with the description of the deal and the fee. If pushed, I’ll provide a list of the lawyers and what they did. But I think it’s harmful to the profession to give too much information. Clients will begin to manage you based on it.”

Earlier in the session, Michael Roch of KermaPartners in London led the audience through his eight-point plan for more profitable pricing. He insisted that the law firm’s general strategy should dictate how it billed. “Your competitive position should have a huge and primary impact on pricing,” he said. A US firm aiming to become the number one personal injury claim practice should be far more competitive than a UK transactional firm, for instance.

Roch also argued that firms should include certain written policies for partner billing. “You need some frames of reference,” he said. “If my firm bills at $300 per hour, can I allow my partner to undercut that at $150 or go up to $450?”

“It’s harmful to the profession to give too much information”
UK takeover rules are “brainless”

A lively debate on the sensibilities of UK takeover rules broke out at a busy, well attended session on corporate and M&A law yesterday morning. Panelists had been asked to dissect recent deals and UK final offers provoked fierce opposition.

“Someone, somewhere thinks this is a pro-shareholder rule. They are just wrong,” said Richard Hall of Cravath Swaine & Moore in New York. “It is a brainless rule. It means shareholders can’t negotiate with the bidder.”

The debate centred on when bidders in the UK announce that their offer to shareholders is final. It is usually qualified by saying that it is final, subject to their being no higher offer. This aims to prevent a long drawn-out purchase period and give the majority of shareholders a fair and reasonable price without too much fuss.

Centrica’s takeover of Venture was used as an example. Here, the bidder acquired 23.5% of the target in a dawn raid and then announced it was considering a bid. It later announced a formal bid and purchased a further 5.4%. By this stage, Centrica decided that there were no other likely bidders, so it made a final offer immediately. It also added an acceptance condition at 50% of the shares in the hope that the house of cards would then fall and it would be able to acquire the remainder.

It was at this point that the US-based panelists spoke out. “This seems at odds with the US perspective,” said Patrick Naughton of Simpson Thacher & Bartlett. “We don’t have a point where an offer can just succeed or fail. Shareholders are not in the position where they think they could have got 10 cents more, but don’t because they’d rather have a deal than no deal.”

The UK’s “put up or shut up” (PUSU) announcement was also questioned during the session, especially from the enthusiastic participants in the audience. PUSUs are designed to counter virtual bids – when a bidder builds a stake and announces it may launch a formal bid. The target can ask the Takeover Panel to push for the bidder to reveal its intentions. This prevents doubt from creeping in.

This happened in the Kraft/Cadbury deal in autumn 2009. Kraft mooted the idea of a possible offer of 745 pence per share on September 7. Cadbury rejected and contacted the Takeover Panel, which imposed a deadline for Kraft to put up or shut up by November 9. This process was completed before the end of September.
An integrity conundrum

Yesterday afternoon’s session on lawyers’ role in the fight against money laundering revealed the many conflicts and difficulties that both law firms and regulatory bodies face in establishing clear guidelines in the area.

At the centre of the debate was Stephen Revell of Freshfields Bruckhaus Deringer’s question of whether lawyers are sufficiently involved in money laundering across various jurisdictions to merit the outlay, and impact on client relationships, that can result from compliance with Financial Action Task Force (FATF) and national requirements.

“Requiring lawyers to whistleblow suspicious transactions or clients is a threat to their relationships with other, honest clients,” he said, referring repeatedly to the “integrity conundrum” that faces lawyers that may be unwillingly involved in a corrupt transaction.

Revell also voiced his concerns over the lack of a level playing field in the application of FATF recommendations, leading to a lack of harmonisation that he worried leads to “in having to do a disservice to clients by presenting them with a different picture of the situation with every lawyer they speak to”.

These anxieties were addressed by keynote speaker Luis Urrutia Corral, president of the FATF, who tried to put the group’s recent work into context for a room full of interested lawyers. Urrutia Corral admitted that “many countries need to significantly improve measures relating to money laundering and terrorist financing”, but cited optimistic measure that the taskforce was undertaking to improve the focus and effectiveness of its work.

Urrutia Corral emphasised the narrow definitions under which lawyers are required to comply with FATF recommendations. However, he didn’t shy away from the 2003 decision to extend the rules to lawyers, citing extensive research into how, in their role as transaction “gatekeepers”, they could either unwittingly or knowingly become involved in a variety of corrupt transactions.

Urrutia Corral was particularly keen to promote the organisation’s shift towards a risk-based assessment model, which allows resources to be directed towards the areas that pose the greatest threats. “Risk can be identified in a number of ways, be it jurisdictional or based on the involvement of a politically exposed person or certain suspicious requests,” he said. Such assessments are a positive move away from the recommendations’ traditional model, which operate on a rules-based foundation where everything is treated equally.

Urrutia Corral cited a recent G20 request that identified 28 jurisdictions with potential deficiencies in their anti-money laundering regimes. He also reported that 20 of those pinpointed had already made a firm commitment to address the problems, and devised action plans.

But the audience of lawyers were more concerned with how future FATF work would affect them. “We’re making a sustained effort to get more input from the private sector, including lawyers,” insisted Urrutia Corral. “We have close links with the IBA, and are currently working with various bodies on proposed changes to the fourth round of investigations.”

Delegates were also treated to an insightful speech by Emile van der Does de Willebois of the World Bank Centre for Financial Reporting Reform. Van der Does focused on asset recovery targeting the proceeds of corruption, delivering the results of an extensive investigation into where key weaknesses in the system lie.

Most controversial of his findings was an assertion that among the high involvement of professional intermediaries in potentially corrupt transactions, “the vast majority of lawyers knew fully well what was going on – there was no unwitting involvement”. This drew protests from panel member Jonathan Goldsmith, of the Council of Bars and Law Societies of Europe.

“If we’re told by the experts that the vast majority of lawyers involved in money-laundering activities are knowing, then why do we have an elaborate structure that undermines the Rule of Law for the tiny minority that are unwitting?”
Public-private partnerships (PPP) around the world have dropped by a third since 2008. And while many point their finger at the credit crunch, plain old politics might be just as much to blame.

Every region was represented by the eight-strong panel in yesterday morning’s session ‘Delivering PPPs after the global financial crisis – do they have a future?’ which gave the packed room a global snapshot of the future of large-scale developments.

And despite the session title, it seems projects lawyers are as much concerned with prevailing governments’ policies as the availability of finance.

UK projects kicked off the discussion, with a focus on the new coalition government’s emergency budget which culled hundreds of projects (including 700 school initiatives) in favour of infrastructure goals. This is in stark comparison to the Netherlands, France and even Scandinavia (normally apathetic towards this type of finance), where PPPs are becoming more popular.

“As PPP embeds itself in continental Europe and becomes an alternative method [of finance], the UK is in a funny position of having fallen out of love with it,” said panellist Andrew Petry, from Addleshaw Goddard in London. Massive investment is required by the government, he said, and it doesn’t realise that the UK is going to have to compete for private capital internationally.

One challenge for PPP in sub-Saharan Africa is the region’s socialist history. Infrastructure is typically financed through traditional non-private sector sources, and to the extent PPP has been embraced, it has largely been pursued by political connections.

But Ghanaian speaker David Kwabena Ofosu-Dorte assured the audience that his country, along with Nigeria, was setting an example for its neighbours. Both countries are reforming policies to encourage competitive bidding, set clear distinctions between PPP and public procurement, and elucidate priority projects.

The politics of public-to-private partnerships

The warning for Australia related to future of transport projects in the state of New South Wales. Panellist Rashda Rana, from construction company Bovis Lend Lease, warned that financiers were being scared off by the state government’s tendency to cancel projects at the last minute. She said this had happened 14 times in the past 10 years, the most recent example being the Sydney underground metro system which was pulled just five days before would-be concessionaires’ submissions were due. The consensus is that the decision was made to improve the chances of winning a marginal seat affected by the proposed plan.

These decisions make construction companies and financiers more cautious about proceeding with PPPs. Audience member Thomas Wilson, from Kárpáthik Stockton in Dubai, queried stipends for unsuccessful bidders. If concessionaires knew they would be compensated (at least in part) if they weren’t to win the tender, perhaps they might be more forthcoming.

But chair Doug Jones, from Clayton Utz in Sydney, said only one Australian state’s law requires the compensation of losing bidders, and panellist John Miller from Massachussetts said it was frowned upon in the US.

Perhaps unsurprisingly, where there has been less of a hurdle for PPPs recently is the world’s emerging economies. India’s Manoj Singh and Brazil’s Cecilia Vidigal Monteiro de Barros were the voices of the Bríc (Brazil, Russia, India China) countries on yesterday’s panel, and both reported that the financial crisis left their countries as fast as it arrived. In Brazil particularly, projects have been spurred along in preparation for the 2014 Football World Cup and the Olympic Games which come just two years later. Although the upcoming November election has halted developments, there’s expected to be intense investment over the next four years.

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IN THE CITY

Stanley Park

Only a short 30-minute walk west from Vancouver’s downtown hotels, Stanley Park is a 1000-acre escape from city life. The major pulling power of the park is the trail network. You can spend hours exploring the numerous paths that weave their way through rainforest’s greenery. For the less adventurous, there is the option of a horse-drawn carriage ride. The company operating these rides is based in the main car park and offers hour-long bookings every 20 to 30 minutes. Elsewhere in the park, there is a pitch and putt course, a children’s petting zoo, a miniature train and the beach shore of English Bay. Another major attraction in the park is Canada’s largest aquarium, that houses sea otters, sea lions, dolphins, sharks and Beluga and Orca whales. For those that want to save their legs until they get to Stanley Park, jump on the 19 bus anywhere along Main Street, West Pender Street or on Georgia Street west of Pender Street.

The Seawall

The seawall surrounding Stanley Park deserves a mention of its own. The seawall actually starts downtown, to the east of the park, and finishes to the west at Point Grey. It is unlikely that you have brought your bike with you, so the best place to start is around the crossroads of Denman and Georgia. There are plenty of rental shops here charging up to $30 to rent a bike for the day. Once you have taken the simple directions to the seawall from the rental shop, head west to loop 8.8 kilometres around Stanley Park. Those with extra energy can keep going west to see English Bay and soak up the atmosphere of the urban sand spots of Sunset Beach and English Bay Beach. If your legs are still peddling, head on through Yaletown to see some modern architecture and Granville Island for art galleries and a public market. From here you can get the AquaBus across False Creek to take you within free-wheeling distance of your rental shop.

Kayaking and canoeing

Not many major cities can offer water sports on its doorstep, but Vancouver is one of them. Multiple locations offer excellent services for every level of confidence. False Creek is best for beginners. Its waters are renowned for being universally still and the Creek benefits from the beauty of the Yaletown, Fairview Slopes and Granville Island skylines. Indian Arm is for the more confident. The fjord is 18 kilometres long, is lined by untouched rainforest and equipment can be rented from Deep Cove. Finally, Takaya Tours offers a two-hour ocean trip in a 12-seater canoe. It departs from Cates Park and Salish guides provide an entertaining commentary through-out.

OUTSIDE THE CITY

Capilano Suspension Bridge

For those with a stomach for heights, why not walk 230 feet (70 metres) above the Capilano River? The suspension bridge has a span of 450 feet and is over 120 years old. Next to the bridge is a 27-acre park containing Treetops Adventure. This new attraction allows tourists to explore the evergreens over seven suspension bridges, up to 100 feet above the ground. The park also houses an impressive collection of traditional Totem poles, which should not be missed. Capilano Suspension Bridge is only a 10-minute ride from downtown Vancouver. You can reach it on the 236-bus from Lonsdale Quay or on the free shuttle bus service. Details can be found at www.capbridge.com.

Cleveland Dam and Fish Hatchery

Only a few minutes further north of the Capilano Suspension Bridge is the Cleveland Dam. A visit here provides a stunning mixture of engineering achievement and natural beauty. The concrete dam was built in 1954 and is named after Ernest Albert Cleveland, the first commissioner of the Greater Vancouver Water District. It holds back the Capilano Lake and provides incredible views of the mountains of the North Shore (locally known as ‘The Lions’). The vast amount of water that chorns through the dam every day supplies around 40% of the Lower Mainland’s fresh drinking water. A short woodland walk takes you to the Capilano Fish Hatchery and autumn is the best season to see salmon completing the final leg of their journey to reproduce.

Grouse Mountain

Grouse Mountain is only slightly further away from downtown Vancouver – a 15-minute drive (the 236 bus from Lonsdale Quay is, again, the best option). The mountain is known as ‘The Peak of Vancouver’ and gondolas whisk you to the top to experience the heady, panoramic views. But it isn’t just the vista that will take the breath away. There is also the opportunity to slice through the thin air at 80 kilometres an hour on a zip-line circuit or take part on a tandem paragliding trip with a professional guide. For those that prefer enjoying their thrills in a little more comfort, Grouse Mountain also houses the so-called Eye of the Wind. This wind turbine provides a viewing platform at the very top of the tower for more fantastic views. (www.grousemountain.com)

FURTHER AFIELD

Whistler

Whistler hosted the alpine and Nordic venues for the Olympic and Paralympics Winter Games earlier this year. The four-season resort is a mere two-hour drive along the Sea to Sky Highway (Highway 99) from Vancouver. But for the sake of an hour, take the Whistler Mountaineer train journey, which packs in dozens of picture perfect scenic en route. However you get to Whistler, you will not be bored once you arrive. Aside from the winter sports and mountain treks, there are four championship golf courses, a designated mountain bike park, and zip-line treks. And despite it not being peak snow season, take a gondola or helicopter ride to take in the vistas.

Tofino

Forget California, if you want to go surfing head for the west Canadian town of Tofino. It only has a population of around 2,000, but it was named the best surf town in North America in the Outside Magazine 2010 Editor’s Choice awards. As well as a guarantee of good waves, Tofino is in the Clayoquot Sound UNESCO Biosphere Reserve, so visitors also enjoy stunning views and ecological diversity. The town is also home to spectacular Botanical Gardens, The Crab Dock, Ken Gibson’s Rhododendron Hill and numerous spas. For those interested in local history, Tofino is immensely proud of its connection to the Nuu-chah-nulth First Nation that has been fishing in the area for over 10,000 years. And for those more interested in celebrities, Scarlett Johansson and Ryan Reynolds honeymooned in Tofino last year.

Victoria

Victoria is the capital city of British Columbia and is only a short journey across the Strait of Georgia to the south of Vancouver. The city is well known for its museums and Chinatown, but there is still plenty to see outdoors. The Butchart Gardens are visited by over a million people a year and have been open for over a century. Visitors can also hike, run or cycle along the Galloping Goose Trail. This old railway line takes in local farms, lakes, marshland and forest – everything rural Victoria has to offer. But the main attractions for fans of nature are the whale-watching excursions. For a reasonable fee, many operators will take you out to watch 5000kg Orca whales playing in the waters around Victoria. Keep your eyes peeled for sea lions, porpoises and seals too.
Chair of the IBA Legal Practice Division, Hendrik Haag, talks to Peter Cary about the financial crisis task force’s preliminary report and why economic recovery is going to take more than a weekend

“A banking and insolvency partner at Hengeler Mueller’s Frankfurt office, Hendrik Haag’s work with the IBA includes chairing the Task Force on the Financial Crisis, which released its interim report last April. He is also the former chair of the IBA’s Banking Law Committee and co-authored *Bailout Handbook for Civil, Commercial and Business Law.*

In this morning’s LPD showcase session ‘Boilingleave: The legal and regulatory challenges for a new approach to financial institution resolution regimes,’ he will discuss some of the report’s findings as well as fresh approaches to insolvency law and regulation.

How does the task force address issues of transparency in relation to the public?

I think it’s a dynamic process. It’s a little bit like airport security; the last terrorist attacks happened at the lowest point of airport security and financial regulation is also like this. That means that a financial crisis is met with very strict rules since the financial industry has a very strong influence on economic growth around the world. When a financial industry is producing efficient products and is offering affordable loans, it’s very good for the economy. Regulation has a direct impact on the price of financial products and so you always have a tension where, if everything went right and nothing happened for a number of years, an enormous pressure would rise within the industry to relax regulation. That’s exactly what was behind the sub-prime mortgage boom, which was very much supported by politicians and the central bank, because people who couldn’t afford a home suddenly could. But of course they still couldn’t afford it – they could just buy it.

Unfortunately, regulation is cyclical. But I think what we’re seeing now are good improvements. They will not actually prevent future crises because this would mean putting the entire industry on a very tight leash, which is bad for the economy. I think some of the regulation that has come out is aimed at preventing a crisis. For example, compensation systems for bankers: banks should not reward excessive risk-taking; banks should work toward instilling more long-term thinking in their people. These are things that lead to preventing a crisis. There are also ones that are aimed at recognising a crisis early so we can work against it.

Systematic risk boards also create a new layer of supervision that looks at development on a global scale. People hope that if we had had these institutions five years ago, someone would have said, ‘look what’s going on in the US with the sub-prime crisis, what’s going on with this CDL, this can’t be right – that’s a big risk, we should work against that.’ It’s probably a dream that people would have recognised that and someone would have listened, but it’s worth trying. The third issue, I think, is where the public come into play. Banks do many different things. They have a utility function and then more speculative trading functions. Both are valuable parts, but the public is entitled to the utility function not being exposed to the risk of the other part of the bank. Part of future regulation is therefore aimed at protecting the utility function from the rest. You can see this in the US where banks now have limitations on the derivatives business and other scenarios. For example, regulations are being developed whereupon the insolvency of an institution, bank accounts can be separated from the rest and such that the deposits survive and that that part of the bank can continue to serve its function by doing deposits, remittances, handing out home-owners loans and so on – something that’s very basic for the public. I think that’s important. We had all of this back in the 1930s with the Glass Steagall Act, where deposit taking institutions were not allowed to engage in securities business and trading, which was relaxed in the 1980s and 1990s in the US. We’re not going back there because it’s a very inefficient way to separate the two institutions, but you really have to deal somehow with the issue that the public will not accept – for a second time – tax-payers having to bail out the institutions in order to rescue deposits because other parts of the bank have messed it up.

Do you believe that some current practices are simply impractical, or even designed to be complicated and to obfuscate risk?

The financial industry has institutions of totally different degrees of professionalism. You have the top ones that design very complicated products and on the other hand you have mid-tier banks that practice the conventional lending business and are not engaged in these complicated products to the same extent. In Germany these mid-tier banks, especially those from the public sector, started to get involved in structured investment vehicles. Why did they do this? The high up-front fees in these products that really boosted the system of exchange works. I think the system was probably a dream that people would have recognised this.

How do you deal with this?

Regulation has to be much stricter when setting standards for the procedures a bank must go through before getting involved in these new lines of business. They must be stricter regarding the personal qualities and expertise that people must have as they do this. It’s likely that liability of executives will be increased if they fail to follow the process. I’m not 100% sure that it’s right that in the financial industry each player has to watch out for themselves. If you have this enormous difference in expertise, why would you actually allow one of the top banks to sell products to another player when the seller should have realised it was very clear that the buyer did not really understand what it was doing?

There have recently been a number of instances where individuals have affected markets through errors and mistakes. What kind of regulation can be put in place to stop things like this happening?

I think that’s a tactical issue. That’s an issue of how the system of exchange works. I think the system should not allow this and I’m surprised that a system would accept an order that presents or represents an inappropriate percentage of the market. But systems have tended to allow it and I think that’s a tactical issue. The other question is of course people like French trader Jérôme Kerviel being able to escape all the tax imbalances and that’s a big issue. There is also Andrew J Hall, a chief oil trader at Citi who sought a $100 million bonus. It’s very hard to control these people because they are so powerful inside the institution. One of the areas that regulation was
approaching, at least here in Europe, was raising the value of back-office people – that is, strengthening them by saying that you have to pay them better. If every talented person wants to work in the front office because they earn more money, then you will never find people in the back office that have the standing to control people in the front office.

Besides organisations like the IBA, is there enough cooperation going on internationally and how effective do you think international regulation has been?

It’s a bit disappointing. When the crisis was at its peak, everybody was crying for the global regulator. And then each state became very much occupied with rescuing its own financial industry, trying to calm its own people. The measures they took varied very much, so they only looked at the needs and interests of their particular country. All that we have left now which is still progressing is G20. But this is a very diverse institution, way too diverse to arrive at a common ground that’s reasonably unprepared to deal with problems and at the time of insolvency, everything is happening. The world was, however, surprisingly unprepared to deal with these mega-insolvencies. I would wish that this cooperation between the states in which a mega-institution is actually working, because you can see what happened with Lehman. We are representing the insolvency administrator here with Lehman Germany and that administrator has just filed a $100 million suit against the administrator of the Lehman estate in the UK. They are fighting about money that went from the UK to Germany around the point of insolvency. That’s just an example of how it should not be – a global organisation breaking down into little pieces and at the time of insolvency everyone fighting for money for the benefit of people in its own jurisdiction.

How has the IBA been most effective on this issue and how do you see it continuing to help financial regulation in the future?

The LPD showcase is going to discuss the idea of ‘bailing in’ – a concept that will require a certain level of international cooperation and agreement in putting these practices into place. Are you hopeful that’s something that will happen on an international scale?

Yes, I’m very hopeful that it will happen. I think everybody should appreciate it’s impossible to avoid future crises, partly because it’s not economically desirable to design a regulatory system that is so controlling that it will actually choke innovation in the financial industry. It will happen again. The world was, however, surprisingly unprepared to deal with insolvency in the financial industry and so what’s definitely most worthwhile at this stage is to work on mechanisms dealing with these mega-insolvencies. I would wish that this would also involve better cooperation between the states in which a mega-institution is actually working, because you can see what happened with Lehman. We are representing the insolvency administrator here with Lehman Germany and that administrator has just filed a $100 million suit against the administrator of the Lehman estate in the UK. They are fighting about money that went from the UK to Germany around the point of insolvency. That’s just an example of how it should not be – a global organisation breaking down into little pieces and at the time of insolvency everyone fighting for money for the benefit of people in its own jurisdiction.

How has the IBA been most effective on this issue and how do you see it continuing to help financial regulation in the future?

What’s really helped is the debate within the task force. All of us are in one way or another involved in advising financial institutions and banks and also have influence with how to regulate. The exchange of expertise and experience in various jurisdictions was certainly important for each of us. We’ve had our sessions at a number of IBA events: our last conference in Madrid, and the group member summit in London where we had interested members of the public who I think very much benefitted from our debate. So I think we have actually made a valuable contribution. What’s unique for the IBA is that we are a group of lawyers who have actually been involved in advising financial institutions that are active and involved on this scale for a very long time. The reason why we started the task force is because of exactly what’s now happening. We feared that national egoism would take control and would start setting rules that made it more difficult than ever for global institutions to pursue their business, and set aside regulatory requirements for a large number of institutions in a large number of countries that have conflicting regulatory requirements. And that was actually the issue – to point this out. The task force has not concluded its work. We originally planned to present our final report in Vancouver, but as you can see, we have new regulation coming out every day and the process is much less mature now than we thought it would be when we started the task force two years ago. So actually the report that we’ll be presenting will be more comprehensive than before, but it will not be a final report because the dust still hasn’t settled completely.
When it comes to ice hockey, Vancouver is nothing short of passionate. With just under 500,000 registered players, Canada takes the top spot for hockey fanaticism and dice don’t look set to change anytime soon. Resident Vancouver Canucks have seen varied fortunes since their inception in the National Hockey League (NHL) in 1970, but fans refuse to be perturbed and remain eager to triumph.

Die-hard Canucks enthusiast and blogger, JJ Guerrero flies the flag for his team with daily and hourly updates on all-things-Canucks via social networking site, Twitter and his blog page, canuckshockeyblog.com. The site’s good-natured motto (“40 years of futility doesn’t stop us from cheering”) aptly demonstrates the love that many locals feel for the sport, combined with genuine hope for each coming season.

One thing that seems certain not to change is ever Canucks fan’s ultimate dream: a run for the coveted Stanley Cup to watch a game live. The stadium was completed in September 1995 at a cost of C$160m of private investment and boasts a capacity of 18,810 for each game, including 88 luxury suites. In-keeping with Vancouver’s reputation for positive living, the arena differs from the average sporting venue in the catering that it offers. Along with the old favourites of hot dogs and popcorn, you can pick up a selection of Japanese and Mexican alternatives that are bound to satisfy anyone looking to make the most of the city’s diverse multicultural cuisine. When it comes to game time however, all eyes will be firmly set on the ice – ready to witness every stroke.

Fans of varying team loyalties set aside their differences earlier this year when the arena ran a brief stint as Canada Hockey Place in time for the 2010 Winter Olympics that saw both the male and female Canadian teams emerge as gold medallists, beating the United States 3-2 and 2-0 respectively. It was a proud moment for the city and the nation as thousands of fans took to the streets to celebrate. Many had placards and banners displaying the victorious declarations: “Our game, our gold!” When it comes to ice hockey, the most cynical of critics would have a hard time trying to find holes in local sporting patriotism.

Despite never having secured the much-sought after playoffs title, the Canucks’ last 82-fixture season kept players at a 60% win-rate, resulting in their emergence as Northwest Division champions for the third time in four years under head coach, Alain Vigneault. Vigneault’s introduction in 2006 certainly seems to have had a positive impact on the club in that respect, but few can resist asking if the good fortune will extend anytime soon to the honour of having each Canucks player’s name engraved on the Stanley trophy as they have spent four decades hoping.

Wide-eyed glory aside, 40 years has produced some memorable moments and iconic traditions, not least the emergence of a Canucks fan-favourite involving an entire stadium waving white towels in memory of a particularly tense moment in 1982 where ex-coach, Roger Nielson placed a towel on the end of a hockey stick in mock surrender after a frustrating series of events with game officials. Nowadays the action is used purely in support of the players and indicates a long-term Canucks following.

Six kilometres east of GM Place lies the team’s old stadium, Pacific Coliseum. Now home to the major-junior Vancouver Giants, the venue has undeniably seen its share of memorable moments. Despite only having been inaugurated in 2001, the Giants hold a staggering success rate in the Western Hockey League (WHL) including a 2005/06 championship win and the securing of the Memorial Cup in spring 2007.

Such obvious promise is good news for the older Canucks up the road, who are always on the look-out for fresh talent to join their family home. Whether you get front row seats to a game, or watch from the comfort of one of Vancouver’s many drinking holes, you’re sure to find yourself in the midst of hard-hitting ice hockey fanaticism over the coming days. If it happens to capture your imagination as it has so many others, it may even be worth carrying around a white towel for a while – just in case.

The Vancouver Canucks 2010/11 season begins on Saturday October 9 against Los Angeles Kings at 7pm, GM Place.
WE LOOK FORWARD TO WELCOMING YOU AT IBA DUBAI 2011

OUR IBA TEAM FROM TOP: DR. FARAJ AHNISH, MANAGING PARTNER, ABU DHABI; SADIQ JAFAR, MANAGING PARTNER, DUBAI; RICHARD BRIGGS, EXECUTIVE PARTNER; ALAN RODGERS, PARTNER; SAMEER HUDA, PARTNER; MICHAEL LUNJEVICH, PARTNER; ERIK MUTHOW, PARTNER

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By Elizabeth Fournier

Back in June, International Financial Law Review (IFLR) magazine held its annual Bankers’ Counsel Poll. The anonymous survey asked European in-house lawyers their views on and predictions for the investment sector’s most pressing topics. Relaxed disclosure standards for sovereign bond issues was the key concern, along with regulators’ response to the downturn and the appearance of living wills. Here are the highlights from the report.

Reputation is not enough

“Sovereign debt problems are going to keep in-house counsel very busy for the next couple of years. Investors bought on ratings and yields and have no idea how to restructure when the shit hits the fan.”

With ongoing turmoil in Europe linked to Greece’s debt downgrades, and concern over the budget deficit of several other Eurozone countries, the resounding call among bankers’ counsel polled for IFLR’s annual industry survey was for more due diligence and disclosure to be carried out on sovereign issues.

One hundred percent of respondents agreed that governments shouldn’t be allowed to depend on reputation and ratings alone when selling bonds. Initial and ongoing disclosure requirements need to be introduced, and implemented without exclusion. The Greek debt crisis has left many market participants angry that the government kept its budget deficits under wraps for so long, and it’s changing the way that investors look at state-issued paper.

“Sovereign issuers, as well as nationalised or semi-nationalised institutions, need to grasp how international disclosure standards work,” says one respondent. “We need to do away with exceptions to the rules.”

Sovereign bonds are characterised by the lack of disclosure typical of central banks before the most recent crisis, and investors are still flocking to buy them despite this, though at a vastly increased yield. As recently as April 13, Greece sold $1.9 billion of short-term notes, just two weeks before Standard & Poor’s downgraded its credit rating to junk grade.

Regulatory Convergence

Acting alone

In-house counsel are still bemoaning the fact that regulators are unable to coordinate a global response to the most important regulatory questions. Negotiations have been slow, unproductive or non-existent, and national regulators aren’t helping by taking matters into their own hands. It’s left 57% of respondents citing a lack of coordination as their biggest concern during investigations by their regulators.

This regulatory discord was highlighted on May 18, when the German regulator Bafin decided to act alone to ban naked short-selling of Eurozone sovereign debt and associated credit default swaps. Bafin’s move came in for particular criticism from those polled, with respondents angrily noting that a lack of harmonisation could be allowed to threaten market stability.

“There’s been no coordinated global response at all. Bafin acting on its own is a perfect example of the problem,” says one lawyer.

And delayed or truncated regulatory discussions have only added to last year’s decisive conclusion (70%) that a global regulator would not work.

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Focus has shifted firmly to national regulation, with even the EU’s proposed European Securities and Markets Authority (Esma) coming in for preemptive criticism.

“Esma will have to be incredibly bureaucratic with lengthy consultations for everything,” says one lawyer. “The more regulation gets shifted to Europe the less flexible it will become.” Only 14% of participants thought Esma would be better than existing bodies at performing its proposed functions, with 57% predicting there’d be no change in effectiveness, and 29% opining that the markets would be worse off.

Of those that were pessimistic, one respondent stepped back from the idea of combining regulators at all, preferring to stick to the tried and tested model of national supervision specifically planned for each country.

“We’re better off with national regulators that understand their own markets,” he says. “They should link up with each other, but apply the standards that are best suited to their own jurisdiction.”

To make sure that this happens, in-house counsel are keen to step up and take on a more reciprocal role with regulators. It’s the best way to ensure that the new regulation under development is as relevant and viable as possible.

“Regulators need to spend more time interacting with the firms that they supervise,” says one respondent. “They should talk to legal and compliance and even banks’ external law firms during investigations. That way they can give individual guidance rather than attempting a one-size-fits-all approach.” At the moment there are concerns that regulators’ interaction with institutions is focused and cause confusion among departments.

“There’s a tendency for people to not understand quite what they’re looking for,” adds one lawyer. “The more regulation gets shifted to

How would you classify the regulatory reaction to the financial crisis?

- Insufficient 29%
- Appropriate 14%
- Too extreme 57%

How well equipped do you think the European Securities and Markets Authority will be to carry out its proposed functions?

- Better than existing bodies 14%
- The same as existing bodies 57%
- Worse than existing bodies 29%

What concerns you most about the process of investigations by your regulator?

- Lack of coordination between multiple regulators 57%
- Extent of documents requested 29%
- Tight deadlines for submissions 14%

Do you welcome regulators’ plans for banks to have living wills?

- Yes 60%
- No 40%
In-house lawyers say that investors are already taking a more active role in transactions, particularly on pricing. “Institutional shareholders are starting to object to points such as underwriters’ fees, which they wouldn’t have got involved with before,” says one counsel working in equity capital markets. Speculation over the fees paid to underwriters on the recent Prudential rights issue has focused activism, and at the end of May a new shareholder body, the Institutional Investor Council, announced that its first act would be to launch an official enquiry into rights issue fee structures. A report is expected by the end of 2010.

But whether legal teams have been bolstered or not, in-house counsel are increasingly optimistic that their contributions aren’t falling on deaf ears. Seventy-one percent reported that the commercial side of their institution had become more receptive to input from legal and compliance teams over the last two years. This is a good sign for those lawyers frustrated that bank transactions were too interconnected and there was little they could do to change practices.

“Risk is the word on banks’ internal boards’ agenda, and it’s making origination teams more aware too,” says one of the counsels that IFLR spoke to. Recent investigations into securitisation transactions by regulators in both the UK and the US have also refocused scrutiny on internal risk practices, giving lawyers examples to hold up as a warning.

More selective investors
And it’s not just banks’ boards that are taking a closer look at contracts. Everyone polled agreed that the needs of the buy side have a greater impact on the structuring of products than they did 18 months ago.

“In a market like this it’s not enough to tell investors that something is a great stock,” says one respondent. “Investors are much more selective and you can’t just drive through deals.” Instead, potential investors have to be brought into deals much earlier, which inevitably raises the risk of insider trading accusations if not done in a very structured and open way.

And this is one area where in-house counsel are welcoming increased interaction with the FSA, which they hope will lead to better guidance on how to handle information dissemination to potential anchor investors.

“There’s been much greater scrutiny on insider trading recently,” says one in-house equity specialist. “There hasn’t been a huge regulatory clampdown in equity capital markets or M&A transactions, and rightly so. But looking into insider trading is a positive move.” Another area that regulators seem determined to consolidate is the introduction of so-called living wills. These plans, known as recovery and resolution plans by the FSA and “contingent resolution plans at certain large insured depositary institutions” by the Federal Deposit Insurance Corporation in the US, are designed to help regulators find the best way to wind down banks’ remaining activities in case of future failures.

A complete red herring
But authorities acting in isolation won’t work. Many of the institutions deemed too big to fail – and so most in need of a living will – are complicated, cross-border banks that would be impossible to wind down according to national rules.

“Living wills are a complete red herring,” says one lawyer. “If they’re not done globally there’s no point.”

Should more due diligence and/or disclosure be required on sovereign debt?
Yes 100%

Are you doing more due diligence on counter-parties before entering into transactions than 18 months ago?
Yes 71%

What is your biggest fear about a living will regime?
Ratings downgrades 17%
Cost and manpower 33%
Structural changes 50%

Are you doing more due diligence on counter-parties before entering into transactions than 18 months ago?
Yes 71%

No 29%

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QUESTION:
Which sessions are you most looking forward to this week?

Ellen Yost
Frangomen Del Rey Bernsen & Loewy, US
I'm looking forward to the sessions run by the immigration groups and the labour and employment division. We work with law firms all over the world so it's very useful to meet correspondents that we'd otherwise just phone – some at the session, and some in external meetings too.

Prince Obi Orizu
Obi Orizu & Co, Nigeria
I am looking forward to the arbitration sessions later in the week, as that's my area of practice at my firm. I am also the managing partner of the firm I work at, so I'll be attending sessions on law firm management too as I want to learn as much as possible in that area.

Jeremy Lederman
Cumberland Ellis, UK
The sessions of most interest to me are the ones covering dispute resolution. There's a particular one called 'When M&A transactions go wrong' that I'm most looking forward to [this morning, Room 211]. I do quite a lot of work in that practice area so I hope it'll be a worthwhile session to attend.

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Colin Ong
Brunei
I'm looking forward to seeing colleagues at the many arbitration sessions on Wednesday – it will be a busy day. Arbitration is a very small world and the sessions will be a good opportunity to catch up with people from many different jurisdictions.

Nalini Mahanji
Chair of legal division, Sasseta, South Africa
As a human rights lawyer I want to use the sessions to see what the IBA views are on stopping child trafficking, and on family law issues. Not everyone can come to Vancouver, so as the IBA is the voice of the profession I hope to take the message back to practitioners in South Africa.

Rashid Vahed
Chambers Fourteen North, South Africa
I'm stepping into the breach at the last minute to speak at the PPID showcase session on legal aid, on Wednesday morning. But other than that I hope to attend the sessions on damages and medical malpractice, and Friday's human rights symposium. As I am a general practitioner I have my pick of the sessions!

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Scott Megregian
K&L Gates, UK
It's probably a bit cheeky to say this, but I'm looking forward to the session that I'm speaking at on Thursday, covering mining and competition law. I'll also be trying to go to the public law sessions, and some of the other competition law meetings.
Today’s schedule

0830 – 1000
African Regional Forum Breakfast
Ballroom B, Level 1

1000 – 1800
Liability in the digital age
114 & 115, Level 1

1000 – 1300
SHOWCASE: ‘Bailing-in’: The legal and regulatory challenges for a new approach to financial institution resolution regimes
223 & 224, Level 2
Cross border culture: trade law faces new challenges
204, Level 2
When M&A transactions go wrong: the resolution of disputes arising out of M&A transactions
211, Level 2
Environmental crimes: case study
120, Level 1
Corporate perspectives on business conflict management
201, Level 2
Powering the mining industry – what is the industry doing about generating energy for projects?
210, Level 2
Executive compensation – where are we now?
215 & 216, Level 2
Insolvency and restructuring issues in the resource and commodity sectors
221 & 222, Level 2
Use and control of social media in international franchise systems
214, Level 2
Legal issues arising from GPS-based mobile advertisements
122, Level 1
International justice in a human rights era: the application of human rights law in domestic courts
212, Level 2
Medicine and the law: Open Committee business meeting
111 & 112, Level 1
Business aircraft: ownership and operation
207, Level 2
Real estate and anti-money laundering regulations
205, Level 2
Coming and going II: focus on going – exit strategies for the private client.
220, Level 2
Best practices for managing uncertain tax positions
208 & 209, Level 2
Managing the younger generations in law firms
217 & 218, Level 2
Corruption in the oil and gas and extractive industries
202, Level 2
Criminal justice reform in Southern Africa – alternatives to pre-trial detention
191, Level 1
What’s next for law firms III – the future of client relationships: the client’s perspective
109, Level 1
Pro bono: service for nothing and experience for free!
116 & 117, Level 1
The IBA and world organisations
118, Level 2
1300 – 1430 IBA Global Employment Institute open committee business meeting
203, Level 2
1300 – 1400 Human Rights Law Open committee business meeting
210, Level 2
1300 – 1400 Anti-Corruption Open committee business meeting
202, Level 2

1500 – 1800
Foreign investment by state-owned enterprises - national security considerations
223 & 224, Level 2
Financing and private equity investment in healthcare
214, Level 2
Developing mining projects while mitigating adverse impacts
212, Level 2
Current issues in international merger policy and practice
201, Level 2
Cooperation of inside and outside counsel – the value challenge: partnering between inside and outside counsel to improve the delivery of value to corporate clients
Ballroom D, Level 1
Investigation of criminal cases, including MLA requests
203, Level 2
Real estate property tour

Third parties in arbitration: what are the limits?
211, Level 2
Defending the (alleged) devil
116 & 117, Level 1
Limitation of liability clauses in contracts: is it possible to go beyond?
202, Level 2
Construction dispute resolution – is it broken or can it be fixed?
210, Level 2
Cross-border oil and gas pipelines: geopolitics, competition and security of supply
111 & 112, Level 1
If you can’t pay for it, should you be able to drink it? The tension between water as a commodity and water as a basic human right
205, Level 2
Airframe structure in today’s market
208 & 209, Level 2
New capital markets products
202, Level 2
Deal or no deal – hard choices for troubled businesses
221 & 222, Level 2
Managing your supply chain – understanding payment and shipping terms and documents when moving goods from factory to vessel through ports and beyond
121, Level 1
International child abduction – a mock trial of a full Hague Convention case involving North America and a European state
204, Level 2
Sex, wages and videotapes: employment and privacy issues in the hospitality industry
217 & 218, Level 2
Protection of the corporate tax base
110, Level 1
Transfer pricing challenges in a global supply chain: a real world examination
118, Level 1
OECD Guidelines for Multinational Enterprises – what every international lawyer needs to know about possible upcoming changes
207, Level 1
What’s next for law firms IV – are law firm networks the answer?
109, Level 1
Are employed lawyers subject to different rules?
118, Level 1
The crime of aggression under international criminal law
213, Level 2
Financial issues for women in the legal profession – how to make your practice more profitable and valuable for yourself and your firm
120, Level 1
1800 – 1900
The International Sales Open Committee business meeting
121, Level 1
Professional Ethics Open committee business meeting
119, Level 1

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Yesterday’s ‘General Counsel and Antitrust Enforcer Roundtable’ brought together traditionally opposed forces in the world of competition. While the two sides came together in the full spirit of debate, the session was not without controversy.

The panel was chaired by McMillan partner Neil Campbell and Greg McCurdy of Microsoft. Corporate representatives included Henry Horbaczewski of Reed Elsevier, Gil Ohana of Cisco and Jim Murray of Intel. Enforcement agencies were represented by Federal Trade Commission (FTC) counsel Willard Tom and Canadian competition bureau commissioner Melanie Aitken.

One exchange focused on the distinction between Section 2 of the Sherman Antitrust Act which governs monopolistic regimes, and Section 5 of the FTC Act created to fill gaps left by the Antitrust Act.

Tom said one benefit of Section 5 as the absence of private treble damages, which he said carry a heavy load of “institutional paraphernalia” that weigh down the process under Section 2 and make courts cautious in reaching judgments.

“The presence or absence of private treble damages impact the undesirable deterrent effect on pro-competitive conduct on false positives,” Tom said, “and much of that is absent in cases that are explicitly under Section 5.”

But McCurdy then turned to the general counsel panelists and asked: “Do you sleep better at night because there are no private remedies under Section 5?”

Murray, whose company recently settled its antitrust case with the FTC brought under Section 5, was not enthusiastic.

“The commission does not have the power to apply treble damages,” he conceded, “but it does have the power to make your life really miserable.”

He added: “And having lived through the last year I can say it has exercised that power.”

US antitrust: In-house fight back

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